STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 5, 2013
v	No. 312015 Saginaw Circuit Court
ROBERT DAVID DOSTER II, Defendant-Appellant.	LC No. 11-035968-FH

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his conviction and sentence for five counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); two counts of accosting a child for immoral purposes, MCL 750.145a; and two counts of distributing obscene material to a minor, MCL 722.675. For the reasons set forth below, we affirm.

I. ADMISSION OF EVIDENCE

Defendant argues that the trial court abused its discretion in admitting two pieces of evidence: (1) testimony by the mother of the victims about defendant attempting to have anal sex with her and about her history of anal sex with defendant and (2) a video entitled "Two Girls and One Cup." Defendant argues that the mother's testimony was inadmissible because it (1) was irrelevant pursuant to MRE 401 and 402, and (2) constituted improper character evidence or evidence regarding other crimes, wrongs, or acts not presented for a proper purpose pursuant to MRE 404. Defendant argues that the video was inadmissible because it was not properly authenticated pursuant to MRE 901. This Court reviews for an abuse of discretion a trial court's decision to admit evidence. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26. An unpreserved claim, either constitutional or nonconstitutional, is reviewed "for outcome determinative plain error." *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). A plain error is a "clear or obvious" error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first argues on relevancy grounds that the trial court erred in admitting testimony from the mother about defendant seeking anal sex with her during the same week as

the incident involving the children and about the couple's history regarding anal sex. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "All relevant evidence is admissible, except as otherwise provided by" law or court rule, and "[e]vidence which is not relevant is not admissible." MRE 402. However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403.

The allegations against defendant involved the touching of minors for sexual purposes, while the challenged testimony involved attempted penile penetration with an adult. Nonetheless, the prosecution tied the mother's testimony regarding the attempted anal sex to its theory that defendant's penchant for more and varied sex during the week of the incident involving the minor children culminated in those actions. The prosecutor presented this theory in opening statements, stating that defendant and the mother had "gone from a sort of standard sex life to a nonstandard sort of sex life where . . . what he wanted was more and more things that were sort of forbidden, anal sex . . . ." The prosecutor went on, stating, "[D]efendant became more and more . . . addicted to forbidden sex, not just sex . . . . And when [the mother] wouldn't do it or flat out couldn't do it, on that one night, it only took a few minutes for her to leave before he turned his sexual appetite on those children." Because this testimony tended to prove the prosecution's theory, the evidence was minimally relevant. MRE 401.

However, there were stark differences between this evidence and the allegations at issue: (1) the evidence involved sexual acts between adults, whereas the allegations involved defendant's actions against children, and (2) the evidence involved sexual penetration, whereas the allegations involved touching and no claims of penetration. Therefore, while the evidence was minimally relevant to defendant's theory of the case, the dissimilarities between the evidence and the allegations make this a minor piece of evidence, the probative value of which was not substantially outweighed by any prejudicial effect. MRE 403; see also *People v Waclawski*, 286 Mich App 634, 672; 780 NW2d 321 (2009) (quotation marks and citation omitted) ("Unfair prejudice occurs when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence.").

On appeal, defendant adds a new argument relating to the testimony—that the evidence was inadmissible because it was character evidence or evidence of other crimes, wrongs, or acts not admissible for any proper purpose under MRE 404. However, at trial, defense counsel only argued that the evidence was inadmissible because it was irrelevant or, alternatively, inadmissible pursuant to MRE 403; therefore, this issue was not properly preserved for review. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). MRE 404(a) prohibits admission of character evidence generally "for the purpose of proving action and conformity therewith on a particular occasion[,]" absent certain exceptions. MRE 404(b) prohibits evidence of other specific crimes, wrongs, or acts submitted "to show action in conformity therewith." MRE 404(b) permits admission of such evidence offered for a proper purpose, "such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material[.]" "Thus, MRE 404(b) requires the exclusion of other-acts evidence if its only relevance is to show the defendant's

character or propensity to commit the charged offense." *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012). Michigan applies the *VanderVliet*[1] approach to other acts evidence:

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. [*People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000) (quotation marks and citations omitted).]

Had the MRE 404 issue been raised by defendant in the motion in limine like the relevance issue, the prosecution could have argued that this evidence would be used to demonstrate defendant's increased and changing sexual desires as part of the prosecution's theory regarding defendant's *motive*—that defendant had new and increasing desires that were unfulfilled by the mother, which resulted in his actions towards the victims. However, in *People v Watson*, 245 Mich App 572, 579-580; 629 NW2d 411 (2001), this Court concluded that while *Sabin*, 463 Mich at 60-61, "cautioned against admitting evidence simply to show that a defendant has a 'lustful disposition[,]'" the naked photograph of defendant's stepdaughter was properly admitted because it:

> showed that defendant had a motive to have sexual relations with his stepdaughter, which tended to prove that the alleged sexual assaults actually took place. . . . Thus, the other acts evidence showed more than defendant's propensity toward sexual deviancy; it showed that he had a specific sexual interest in his stepdaughter, which provided the motive for the alleged sexual assaults.

Conversely, here, the evidence at issue merely supports a theory of *general* sexual deviancy and a "lustful disposition," not a specific theory of motive that demonstrates defendant had a sexual interest in the victims in particular. Therefore, it was a plain error for the trial court to admit this particular evidence.

Regardless, reversal is not warranted because any error in admission of this evidence would not have been outcome determinative. *Lukity*, 460 Mich at 495-496; *Armisted*, 295 Mich App at 46. Given the inherent difference between defendant's sexual activities with the mother and the instant allegations involving the minor children, a jury would not likely have accorded much weight to the testimony. In addition, the testimony was brief regarding the anal sex incident in light of the overwhelming evidence against defendant, and the prosecution did not reference it during closing argument. See *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013) (quotation marks and citation omitted; emphasis added) ("An error is outcome determinative if it undermined the reliability of the verdict and, in making this determination, a

[1] *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).

court should focus on the nature of the error *in light of the weight and strength of the untainted evidence*.").[2] Simply put, this testimony was not a significant issue at trial.

Next, defendant argues that the trial court erred in admitting Exhibit 1, an internet video ostensibly shown to the older child, because it was not properly authenticated. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). For instance, evidence may be authenticated by "[t]estimony that a matter is what it is claimed to be." MRE 901(b)(1). A video recording can be properly authenticated when a witness views some or all of the video itself. See *People v Hack*, 219 Mich App 299, 309-310; 556 NW2d 187 (1996). When the foundational requirement of MRE 901(a) has been satisfied, any failure to show complete authentication affects the weight of the evidence, but not its admissibility. See *People v White*, 208 Mich App 126, 132-133; 527 NW2d 34 (1994).

While internet evidence has in the past been viewed by some courts nationwide with a skeptical eye, more recently courts have begun to understand the potential value, significance, and reliability of internet evidence. See *United States v Cameron*, 762 F Supp 2d 152, 160 (D Me, 2011), reversed in part on other grounds 699 F3d 621 (CA 1, 2012) ("[T]he Internet has become more familiar and ubiquitous[,] and its potential significance as a critical source for evidence in some cases has escalated. A conclusion that all Internet posting are so inherently unreliable that they are never admissible seems unwise.").[3] Looking to our caselaw regarding MRE 901 generally and cases of other jurisdictions that have addressed this issue, we hold that the trial court did not abuse its discretion in admitting the video.

Despite the fact that the nature of the video at issue—a "viral" internet video[4]—is different than a video typically introduced in trials, such as videos of crime scenes or confessions, the same rules of evidence apply, namely MRE 901. See *In re LP*, __ SE2d __ (Ga App, 2013), slip op at 3 ("Documents from electronic sources, such as the printouts from a website like Facebook, are subject to the same rules of authentication as other documents and may be authenticated through circumstantial evidence."). Thus, the central inquiry is still, given the plain language of the rule, whether the proponent presented "evidence sufficient to support a finding that the matter in question is *what its proponent claims*." MRE 901(a) (emphasis added).

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[2] Testimony of a CSC victim need not be corroborated, *People v Phelps*, 288 Mich App 123, 133; 791 NW2d 732 (2010), which indicates the relative strength of the victims' testimony in comparison to this minor evidence regarding the defendant's and the mother's sex life.

[3] Compare *United States v Jackson*, 208 F3d 633, 637 (CA 7, 2000) (quotation marks and citation omitted) (indicating that internet evidence is "adequate for almost nothing"), with *Qiu Yun Chen v Holder*, 715 F3d 207 (CA 7, 2013) (citation omitted) (stating 13 years later, "We don't agree that all the information available on the Internet is 'voodoo.'").

[4] "Viral" internet videos are popularized videos that are found online on multiple internet websites. *Merriam-Webster Dictionary: Online Edition.*

A close examination of the testimony surrounding the admission of the still frame and the video is required to determine what the prosecution claimed the video to be. At trial, the prosecutor showed the victim a paused, still frame image of the video depicting the two women in the video and engaged in the following dialogue with the victim:

> Q: [C]an you describe for the jury generally what you saw?
>
> A: It was two girls.
>
> Q: Did they look different? Did they look alike?
>
> A: They looked different.
>
> Q: Okay. If I showed you a picture of those two girls, would you recognize that video again?
>
> A: I should.
>
> Q: . . . . Do you recognize that?
>
> A: Yes.
>
> Q: Okay. Is this the video that he showed you?
>
> A: Yes.
>
> Q: Okay. So that's "Two Girls and One Cup"?
>
> A: Yes.

Later, the detective who located the video on the internet and downloaded it testified, and the following exchange with the prosecutor occurred:

> A: Detective Klecker had specifically requested that I look for a particular movie from the internet that had been mentioned to him by the victim.
>
> Q: Okay. . . . [D]id you find that movie?
>
> A: I did.
>
> Q: Okay. And how did you go about finding it?
>
> A: Basic search on the internet through Google.
>
> Q: Okay. Wasn't hard to find, then?
>
> A: No, it was not.

The detective proceeded to confirm that the CD-R in the prosecution's possession was the CD-R that he created and confirmed that the title of the "movie" was "Two Girls and One Cup." Defense counsel voir dired the witness and the following exchange occurred:

> Q: Do you know if there are any other versions of this movie?
>
> A: I do not, sir.
>
> Q: Okay. This isn't—you didn't get this off of a computer—
>
> A: No, sir.
>
> Q: —or—
>
> A: This is taken from the internet itself.
>
> Q: Okay. And you don't have any way of knowing if that's the actual version of the movie that was shown to these girls?
>
> A: I don't, no, sir.
>
> Q: I'm going to object, I don't think we have the proper foundation that this was the actual movie that was shown.
>
> Prosecutor: Your Honor, that is why I had the one still frame up to have [the victim] view so that she could identify for the Court that this was the movie she saw.

Thus, the prosecution claimed this video to be a widely available and easily accessible internet video that was shown to the victim.

The detective's testimony—that he found the video by conducting an internet search and downloading it—along with the victim's recognition of a still frame image from the video—which tended to show that she viewed the video—provided sufficient evidence that the video was what the prosecution claimed it to be.[5] See *Hack*, 219 Mich App at 309-310. Although defendant argued that it was possible that the victim viewed an edited, less offensive version, because she was able to identify the still image from the video, whether the child was shown the pornographic images within the admitted video is an issue that goes to the weight of the evidence and was a question of fact for the jury to decide. See *In re LP*, slip op at 3; see also *White*, 208 Mich App at 130-131 (stating, with regard to physical evidence, that this Court has "held that

[5] Had the prosecution claimed the video was from a specific website, the proofs submitted in this case would not likely have been sufficient. See *Southco Inc v Fivetech Technology Inc*, __ F Supp 2d __ (E D Pa, 2013), slip op at 7; *Perfect 10, Inc v Cybernet Ventures, Inc*, 213 F Supp 2d 1146, 1154 (C D Cal, 2002). However, as this question is not before this Court, we leave this matter for a different day.

any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims.").

Moreover, our caselaw regarding authentication does not require perfect authentication. "It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly." *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). Because the minimal requirements for admissibility were met in this case, we conclude that the trial court did not abuse its discretion.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecution committed misconduct in eliciting certain testimony and in making four distinct statements during closing argument. Because defendant did not object to any of the alleged instances of prosecutorial misconduct, we review this issue for plain error affecting defendant's substantial rights. *Aldrich*, 246 Mich App at 110.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Rice* (*On Remand*), 235 Mich App 429, 434; 597 NW2d 843 (1999). "Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *Id*. at 435. "Appellate review of alleged misconduct is precluded absent an objection, unless an objection would not have cured the prejudice." *People v McGhee*, 268 Mich App 600, 633-634; 709 NW2d 595 (2005).

First, defendant argues that the prosecution improperly elicited testimony from the mother about her sexual activities with defendant. However, a prosecutor does not commit misconduct when he or she elicits testimony in good faith, *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003), and the trial court ruled before trial that the mother could testify about these activities. Accordingly, no prosecutorial misconduct occurred.

Second, defendant argues that the prosecution improperly questioned him about eczema as a medical condition that worsens in the winter. Defendant argues that only a qualified expert could testify that eczema worsens in the winter. "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *Watson*, 245 Mich App at 588. The prosecution's questions indicate it presumed that eczema is generally a wintertime condition, and the questions implied that defendant was lying about the older child needing lotion for her eczema in May. To the extent that any error occurred, it was not plain, i.e., "clear" or "obvious." See *Carines*, 460 Mich at 763. A lay witness may testify about ordinary medical conditions on the basis of his or her perception. See *McPeak v McPeak* (*On Remand*), 233 Mich App 483, 493; 593 NW2d 180 (1999); see also *People v Drossart*, 99 Mich App 66, 73; 297 NW2d 863 (1980). Because eczema is not an unusual medical condition and defendant admitted that he was familiar with the child's eczema, it was not "clear" or "obvious" that the prosecution could not question defendant about whether eczema "flares up" during the winter. Thus, no plain error occurred.

Third, defendant argues that the prosecution committed misconduct during closing argument in stating that "most of [the images found on defendant's phone] are vile pornography." Defendant argues that there was no evidence to suggest that the images were "vile" pornography. But a prosecutor may use "hard language" when characterizing the evidence during closing argument, see *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996), and a detective testified (and defendant admitted) that the images on the phone included bestiality, which has been described as a crime against nature. See *People v Lino*, 447 Mich 567, 606; 527 NW2d 434 (1994) (BOYLE, J., concurring in part and dissenting in part). Because the prosecution reasonably characterized the evidence, no prosecutorial misconduct occurred.[6]

Fourth, defendant argues that the prosecution improperly suggested during closing argument that he was addicted to sex and pornography. Although it is true that addiction is an expert field, see *People v Key*, 121 Mich App 168, 176; 328 NW2d 609 (1982); *Turbin v Graesser* (*On Remand*), 214 Mich App 215, 220; 542 NW2d 607 (1995) (DOCTOROFF, C.J., concurring), a fair review of the prosecution's remarks suggests that the prosecution was emphasizing defendant's unusual interest in sex and pornography, which was supported by the evidence. The prosecution did not emphasize the narrow medical definition of the term "addict," and a prosecutor may argue that "common experience" suggests that certain sexual activity is unusual. See *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). And, even if the prosecution's comment about addiction was improper, an objection could have cured any prejudice because the trial court would have instructed the jury that the prosecution was not an expert in sex or pornography addiction. Because an objection could have cured any prejudice, reversal is not warranted. *McGhee*, 268 Mich App at 633-634.

Fifth, defendant argues that the prosecution improperly noted during closing argument that she was a sex-crimes prosecutor, thus qualifying herself as an expert in sex and pornography addictions. "[U]sing the prestige of the prosecutor's office to inject personal opinion is improper . . . ." *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995). However, a fair review of the challenged remarks shows that the prosecution did not improperly reference her office to support her contention that defendant was a sex and pornography addict. Rather, the prosecution referenced her office to emphasize her understanding that not all pornography is unusual or beyond societal expectations. This brief reference did not deprive defendant of a fair trial, *Rice*, 235 Mich App at 434, and an objection could have cured any prejudice. *McGhee*, 268 Mich App at 633-634. Reversal is not warranted.

We note that in his question presented defendant suggests a constitutional argument and in a preservation of the issue section of his brief, he avers that the issue of prosecutorial

[6] In a related argument, defendant takes issue with the comment during closing argument suggesting that one of the images found on defendant's phone involved "a woman having sex with a horse." However, defendant agreed during cross-examination that the images found on his phone included images of women having sex with horses and dogs. Thus, no prosecutorial misconduct occurred because the prosecution's statement was supported by the evidence. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

misconduct is "structural" and that "[i]f his conviction was the result of prosecutorial misconduct, he would have been denied his Sixth Amendment and due process rights, US Const, Ams V, VI, and XIV; and Mich Const 1963, art 1, §§ 17 and 20." Defendant does not develop this argument. Accordingly, it is abandoned. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002); *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Regardless, there having been no prosecutorial misconduct warranting reversal, there was also no denial of due process or the right to a fair trial.

III. INEFFECTIVE ASSISTANCE

Defendant argues that defense counsel was ineffective for failing to object to the prosecution's questions about eczema and the alleged instances of prosecutorial misconduct during closing argument. Because defendant did not move for a new trial or a *Ginther*[7] hearing, this issue is not preserved for review. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Whether a defendant received ineffective assistance of counsel presents a mixed question of constitutional law, reviewed de novo, and fact, reviewed for clear error. *Id*.

Under the federal and state constitutions, a criminal defendant has the right to effective assistance of counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing US Const, Am VI; Const 1963, art 1, § 20. "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002); see also *Strickland v Washington*, 466 US 668, 687, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Werner*, 254 Mich App at 534.

Defendant argues that defense counsel was ineffective for failing to object to the prosecution's cross-examination about the medical characteristics and seasonal nature of eczema. Before trial, however, the prosecution indicated that the registered nurse who treated the eczema was available to testify about the skin condition but that it could elicit such testimony from the child and her mother. The parties agreed to release the nurse as a witness, and defendant indicated that he "would be willing to stipulate to her skin condition." Defense counsel's agreement before trial to not have a registered nurse testify about the eczema and his failure to object to the prosecution's cross-examination appears to have been a reasonable trial strategy that this Court will not second guess on appeal. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Had defense counsel refused to stipulate regarding the eczema before trial or objected to the characterization of it as a winter problem, the prosecution could have called the registered nurse to testify during the case in chief and/or as a rebuttal witness and her medical

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

testimony would likely have been accorded more weight by the jury. Reasonable counsel could decide that as a matter of trial strategy, it would be advantageous to avoid having the prosecution present testimony by a medical professional.

Defendant argues that defense counsel was ineffective for failing to object during the prosecutor's closing argument. However, because the prosecutor did not make any improper closing argument, defendant cannot succeed as the failure to raise a meritless objection does not constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). And, with respect to the prosecution's reference to sex and pornography addictions and her office as a sex-crimes prosecutor, it was reasonable trial strategy not to object and draw attention to the alleged improper comments. See *Bahoda*, 448 Mich at 287 n 54. Had defense counsel objected, the prosecution could have repeated the evidence and associated it with reasonable inferences showing that defendant had unusual and extreme sexual interests. Arguably, it was better trial strategy to allow the prosecution to conclude her argument on the issue of defendant's sexual interests and move to the next issue, instead of belaboring the issue before the jury. This Court does not second guess such trial strategy on appeal. *Odom*, 276 Mich App at 415.

IV. CUMULATIVE ERROR

Defendant argues that as a matter of due process, the cumulative effect of the alleged errors denied him a fair trial. However, because we conclude that only one evidentiary error was made, reversal on cumulative error grounds is not possible.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra